(1)

Supreme Court, U.S.
FILED

97 1289 FEB 3 1998

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1997

EDWARD A. & JULIET D. BARSCH,
Petitioners

v.

JOSEPH BRANN, *ET AL.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

EDWARD A. BARSCH
PETITIONER PRO SE

1157 BUCHANAN WAY
HAYWARD, CA 94545
(510) 887-4127

58 pp

QUESTION I PRESENTED FOR REVIEW

The actions of the local authorities against plaintiffs were in direct violation of their constitutionally guaranteed rights. Subsequently plaintiffs have been denied the right to a jury trial. Do the rights granted United States citizens as enumerated in the United States Constitution's Bill Of Rights still exist?

QUESTION II PRESENTED FOR REVIEW

Appellant cited in the Appellant Opening Brief four district court orders as the basis for the appeal. Two orders were not ruled on by the court. One of the prime aspects of the appeal was not ruled on. The appeals court did rule on matters which were not part of the appeal. Does the appeals court have the discretion to ignore certain parts of appellant's brief and not rule on crucial issues presented for review?. Does the appeals court have the discretion to rule on issues not presented in the district court and not a part of the appeal?

QUESTION III PRESENTED FOR REVIEW

Is it not the duty of the Court at all levels to monitor the petitioners before it to maintain the integrity of the judicial system? Both the Ninth District District Court and the Appeals Court have ignored multiple instances of unethical conduct, permitting defendants' counsel to make false allegations at will.

QUESTION IV PRESENTED FOR REVIEW

Appellees' Opening Brief contained multiple egregious violations of FRAP Rule 28-2.8. These violations were documented and specifically cited with page and line references in

Appellant's Reply Brief . However, the appeals court ignored the errors documented by appellant and used those false unsubstantiated allegations to decide issues before the court despite documented proof submitted as part of Appellant's Reply Brief that those allegations were false. Are Federal Rules of Appellate Procedure binding upon the Federal Appeals Court?

QUESTION V PRESENTED FOR REVIEW

The district court ignored uncontroverted and documented unethical actions on the part of defendants' counsel. Does the district court have discretion to overlook unethical conduct on the part of plaintiffs/defendants?

QUESTION VI RESENTED FOR REVIEW

Plaintiffs were denied the opportunity to amend the complaint. Such amendment is authorized under FRCP Rule 15(a). FRCP Rule 8 was disregarded by the district court to the prejudice of plaintiffs. Are Federal Rules of Civil Procedure binding upon the district federal court.

QUESTION VII PRESENTED FOR REVIEW

What constitutes "DUE PROCESS" as guaranteed to United States citizens by the United States Constitution in the Fourteenth Amendment?

QUESTION VIII PRESENTED FOR REVIEW

. Amendment of a non-existent document is both legally and logically impossible. Can the district court permit defendants to amend a non-existent document?

QUESTION IX PRESENTED FOR REVIEW

The district court order of November 13, 1996, imposed impossible conditions upon plaintiffs.. Is such action within the discretion of the court?

QUESTION X PRESENTED FOR REVIEW

Do the Federal Courts (both District Court and the Appeals Court) have the discretion to completely ignore pleadings and papers filed with the court?

PARTIES TO THE PETITION FOR WRIT OF CERTIORARI

The following parties are represented in this petition for WRIT OF CERTIORARI.

Petitioners are Juliet D. And Edward A. Barsch in PRO SE.

Respondents are Joseph Brann, Michael O'Toole, Debra Margolis, Lloyd Meyers, Philip Ribera, Reid Lindblom, Gary Tabke, Renee Rushworth, Jason Martinez, Ron McKee, Rhein Santos, Benjamin Richardson, and Myron Dorn. Joseph Brann was the City of Hayward Chief of Police at the time of the incident. O'Toole and Margolis were City of Hayward attorneys at the time, other named individuals were police officers of the City of Hayward, California. Short title of the case in the district court is Edward A. & Juliet D. Barsch v. Joseph Brann et al. Jaynelle K. Bell Lowery , assistant city attorney for the city of Hayward, is counsel for all respondents.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	(I) - (iii)
PARTIES TO THE PROCEEDING	(iiii)
TABLE OF AUTHORITIES	(iiiiii)
CITATIONS OF COURT MEMORANDA AND ORDERS	(1)
STATEMENT OF JURISDICTION	(1)
CONSTITUTIONAL AMENDMENTS, FEDERAL RULES OF CIVIL PROCEDURE, FEDERAL RULES OF APPELLATE PROCEDURE, CALIFORNIA RULES OF CIVIL PROCEDURE, CALIFORNIA CODE OF CRIMINAL PROCEDURE	(2)
STATEMENT OF THE CASE	(2)
ARGUMENT IN SUPPORT OF QUESTION I	(3)
ARGUMENT IN SUPPORT OF QUESTION II	(3)
ARGUMENT IN SUPPORT OF QUESTION III	(5)
ARGUMENT IN SUPPORT OF QUESTION IV	(5)
ARGUMENT IN SUPPORT OF QUESTION V	(6)
ARGUMENT IN SUPPORT OF QUESTION VI	(7)
ARGUMENT IN SUPPORT OF QUESTION VII	(8)
ARGUMENT IN SUPPORT OF QUESTION VIII	(9)
ARGUMENT IN SUPPORT OF QUESTION IX	(9)
ARGUMENT IN SUPPORT OF QUESTION X	(10)
CONCLUSION	(10)

APPENDIX	Appendix page #
Appellate Court ORDER entered Nov 7, 1997	1
Appellate Court ORDER entered	2

Sep 4, 1997

DISTRICT COURT ORDER Entered NOV 25, 1996 5

DISTRICT COURT MEMORANDUM AND ORDER Entered JUN 11, 1996 9

DISTRICT COURT MEMORANDUM AND ORDER Entered APR 29, 1996 11

DISTRICT COURT ORDER Entered NOV 13, 1995 27

CALIFORNIA SUPERIOR COURT MINUTE ORDER Entered FEB 22, 1994 31

CALIFORNIA SUPERIOR COURT ORDER Entered DEC 30, 1993 33

CONSTITUTIONAL AMENDMENTS 35

FEDERAL RULES OF CIVIL PROCEDURE 35

CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 415.40. 37

CALIFORNIA PENAL CODE SECTION 12028 38

TABLE OF AUTHORITIES

CASES:	Page
FOMAN v. DAVIS, 371 U.S. 178,182 (1962)	13,14
HUNTINGTON WOODS v AJAX INC. 441 N.W. 2d. 99 (Mich. App. 1989)	9
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS. IRON SHIP BUILDERS. BLACKSMITHS ,FORGERS & HELPERS v. TRANSUE & WILLIAMS CORP. 79 F. 2d. 1388 (6th Cir.1989)	9
LIDDELL v DETROIT INTER-INSURANCE Mich. App, 302 N.W. 2d. 260.	9
PERLMUTTER v. SHATZER. 102 F.R.D. 245,247 (D Mass.1984.)	9
STRAUSS V DOUGLAS AIRCRAFT 404 F. 2d. 1152 (1968).	9
WINTHROP LABORATORIES 268 F. SUPP 26 (1967)	9
Federal Rules of Civil Procedure	
Rule 8	(ii),7
Rule 11	7
Rule 15	15
Federal Rules of Appellate Procedure	
Rule 28-2.8	(I),11,11,11
California Code of Civil procedure	
415.40	16
California Penal Code	
Section 12028	8

CITATION OF MEMORANDA AND ORDERS

The citation of orders entered by the appeals court, the district court and California Superior Court are delineated below.

Appeals court orders cited are:

1) MEMORANDUM filed by the Appeals Court on September 4, 1997;
2) ORDER filed by the Appeals Court on November 7, 1997

District court orders cited are:

3) ORDER entered by the district court on November 13, 1995:
4) MEMORANDUM AND ORDER entered by the district court on April 29, 1996;
5) MEMORANDUM AND ORDER entered by the district court on June 11, 1996;
6) ORDER entered by the district court on November 25, 1996.

California Superior Court orders cited are:

7) ORDER AFTER HEARING entered by the Alameda County Superior Court on December 21, 1993.
8) MINUTE ORDER entered by the Alameda County Superior Court on February 22, 1994.

STATEMENT OF JURISDICTION

Presented for review are Appeals court decisions:
1) MEMORANDUM filed September 4, 1997 and,
2) ORDER filed November 7, 1997. This order is the rejection of appellant's Request for Rehearing and Suggestion for

Rehearing en banc. This Court has jurisdiction under 28 U.S.C. 1254 (1).

Constitutional provisions involved in this case are the Fourth, Fifth, and Fourteenth Amendments to the United State Constitution, the Federal Rules of Civil Procedure Rules 8, 11, 15, Federal Rules of Appellate Procedure Rules 3 and 28, California Code of Civil Procedure section 415.40, California Penal Code section 12028. Text of these are included in the appendix.

STATEMENT OF THE CASE

On January 25, 1993, plaintiffs were at home.. Their teenage son had not yet arrived home by 11:00 pm.. Plaintiff Juliet D. Barsch intended to dial 411 to get the number of a new friend of plaintiffs' son to check if he was at that friend's address. By mistake she dialed 911 instead of 411. Realizing her error, she immediately hung up the phone without saying a word. However the phone did not seat properly and 911 remained connected. At that time plaintiffs' son came home. Plaintiff Edward Barsch asked his son what the son had done with a handgun that had just been discovered to be missing. The 911 operator overheard the plaintiff asking his son about the handgun. The Hayward Police Department launched an eleven-officer swat team type assault on plaintiffs' home. based on nothing more than the question the father asked his son about the missing handgun. When plaintiff responded to a request from the police saying they wanted to talk to someone from the house, plaintiff Edward Barsch went outside. The police immediately arrested plaintiffs and their son at gun point using shoulder weapons. The police then made two warrantless searches of plaintiffs' home without warrant or justification. The police then fabricated a domestic violence report. Plaintiff Edward Barsch was held in jail for the next 15 hours. The handgun that had been discussed was turned in the next day to the police by the mother of a friend of plaintiffs' son. The handgun was never returned to plaintiffs by the police but confiscated and destroyed. Plaintiff attempted for the next year and half to have the handgun returned. The city attorney's office

insisted that plaintiff had to comply with California Penal Code section 12028 which codifies the return of weapons after conviction. Edward A. Barsch, in 66 years of living, had never been charged with even a misdemeanor offense. This confiscation and destruction of plaintiffs' property resulted in a violation under the Fourteenth Amendment in that only persons whose property consisted of handguns were so treated. After it became clear that there was no hope of recovering the handgun, a lawsuit was filed in the Ninth District Court, appealed to the United States Court of Appeals for the Ninth District and now to the Supreme Court of the United States. The basis for federal jurisdiction in the court of first instance was 42 U.S.C.A. Section 1983. All arguments presented to the court fall under the provisions of Rule 10 (a).

ARGUMENT IN SUPPORT OF QUESTION I

In the assault on plaintiffs by the Hayward Police on January 25, 1993, the Fourth Amendment protections embodied in the United States Constitution were violated. Two warrantless searches of plaintiffs' residence were made. Police then fabricated a domestic violence charge against Edward A. Barsch. However, no criminal charges were ever filed since even the police report documented the fact that the arrest was illegal. Further violations of plaintiffs' inalienable rights consisted of confiscation and destruction of plaintiffs' legally owned property without any semblance of due process being given Juliet Barsch, the registered owner. Recourse to the federal court system has been fruitless. The whole thrust of the court proceedings has been to prevent this case from coming to trial.

ARGUMENT IN SUPPORT OF QUESTION II

If the appeals court does not consider important elements of the appeal, how can an appellant receive a fair hearing? The primary issue in the appeal is whether the assertion of the statute of limitations, 17 months after the complaint was filed, can be considered timely. This legal issue was never ruled on by the Appeals Court. Instead, the appeals court ruled erroneously that

the statute of limitations was an absolute time bar. This ruling conflicts with all other court rulings regarding the statute of limitations being waived if not filed in a " *timely* " manner.

Court rulings supporting appellant's position are:

See LIDDELL v DETROIT INTER-INSURANCE Mich. App, 302 N.W. 2d. 260. In LIDDELL v DETROIT, INTER-INSURANCE the court held that the defendant had waived right to raise statute of limitations defense by failing to assert it in its answer in the circuit court. In WINTHROP LABORATORIES 268 F. SUPP 26 (1967), the court held that the statute of limitations defense had been waived because it had not been raised until 9 months after the complaint was filed. In INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS ,FORGERS & HELPERS v. TRANSUE & WILLIAMS CORP, 79 F. 2d. 1388 (6th Cir.1989) and HUNTINGTON WOODS v AJAX INC. 441 N.W. 2d. 99 (Mich. App. 1989), both courts held that the statute of limitations defense was asserted after a year had passed.. It was not timely and, consequently, was waived. In justifying dismissal of plaintiffs' claim, the Ninth Circuit court refers to PERLMUTTER v. SHATZER. 102 F.R.D. 245,247 (D Mass.1984.) On pages 245 through 249, the Perlmutter court also included an extract from a ruling by Judge Kaufman in STRAUSS V DOUGLAS AIRCRAFT 404 F. 2d. 1152 (1968). To quote from Judge Kaufman

> "In sum, the party wishing to raise the defense is obliged to plead the statute of limitations at the **earliest possible moment**." (Emphasis added)

Even the case cited by the court as justifying dismissal on the statute of limitations defense is contrary to the Ninth Circuit Court ruling on this issue. In view of the fact that defendants did not plead the statute of limitations until 17 months after filing of the complaint, such defense must be deemed to have been waived

ARGUMENT IN SUPPORT OF QUESTION III

In the district court plaintiff documented instances of perjury, falsification of the police records, quoting from non-existent court orders, denying a meeting had taken place that was documented in the court records, falsely alleging incidents that did not occur and attempting to backdate documents presented to the court. Defendants' counsel altered the wording of the police report as originally written in an attempt to prove that Juliet D. Barsch had authorized the search of plaintiffs' residence. Defendants' counsel presented to the court an internal police dispatch report that had been altered to give legitimacy to their actions. Defendants' counsel presented the altered report to the court saying it was a copy of the 911 call. Plaintiff documented these instances of unethical conduct in two Requests for Judicial Notice. However the court response was to ignore the requests in spite of the fact that defendants' counsel did not controvert plaintiffs' allegations, did not deny them, and made no attempt to refute those allegations. In the appeals court, gross violations of the Rules Of Appellate Procedure in Appellees' Opening Brief were documented. Again no notice of these violations was taken. The Appeals Court accepted the false allegations by Appellees' counsel. and ignored documented proof presented by Appellant proving the falsity of Appellees' counsel's allegations that had nothing in the court record to support those allegations. In one instance, appellees' counsel indulged in character assassination by making a false allegation that supposedly happened 2 and a half months after the case had been appealed. This false accusation constituted a gross violation of F.R.A.P. Rule 28-2.8. Yet no notice was taken by the court.

ARGUMENT IN SUPPORT OF QUESTION IV

Appellees' Opening Brief contained multiple violations of F.R.A.P. Rule 28-2.8. One of the most outrageous violation of FRAP 28-2.8 was a false allegation that Edward Barsch was the source of the weapon used in a drive by shooting that occurred

two and a half months after the dismissal of this case in the district court. This was a crude attempt at character assassination in an effort to portray Appellant in an unfavorable light. Appellant called these violations to the attention of the appeals court in Appellant's Reply Brief. However, the appeals court took no notice of those documented violations. The appeals court then used those demonstrably false allegations to arrive at the decisions that were made. It further ignored documentary proof presented by appellant to prove allegations regarding the service of defendant Joseph Brann were false. How can an appellant receive fair treatment if appellees' counsel is free to make false allegations. sans admonishment by the court for gross violations of the Federal Rules of Appellate Procedure? Appellees' counsel even made false allegations of events occurring more than two months after the case was already in the appeal process. This sort of conduct is strictly forbidden by FRAP 46 and is cited as grounds for sanctions and disbarment . The appeals court allowed such violations to go unchallenged. The court can not plead that it was an oversight since appellant in the Appellant's Reply Brief delineated these violations and cited the specific instances by page and line in Appellees' Opening Brief where such violations occurred.

ARGUMENT IN SUPPORT OF QUESTION V

In the district court, defendants were permitted to behave in a manner that plaintiff considers to be not only unethical but criminal as well. Defendants' counsel committed perjury because defendants' counsel's statements made at later dates contradicted earlier statements when both were made under the penalty of perjury The police report was later falsified. Defendants' counsel presented the altered version to the court as proof that the search of plaintiffs' residence had the consent of Plaintiff Juliet D. Barsch. Defendants' counsel also presented an internal police dispatch report (with post incident comments added), claiming that the report was the transcript of the 911 tape previously said to be non-existent. In multiple instances, defendants' counsel quoted from a non-existent court document to demonstrate that

plaintiffs had not complied with a court order. Defendants' counsel further denied that a meeting with the plaintiff had occurred when there was a court record showing the meeting had taken place. Defendants' counsel also falsely alleged that incidents that had not taken place had indeed occurred. All these unethical, bad faith acts were documented and presented to the district court in plaintiffs' Requests For Judicial Notice. The district court took no notice of defendants' counsel's conduct. Defendants' counsel did not controvert, deny, or attempt to refute the bad faith acts documented by the plaintiffs. At a court appearance on November 8, 1996, plaintiff asked the court about the status of plaintiffs' requests for judicial notice. The response of the court was that the court was not going to get into that. Plaintiffs could not receive fair treatment when defendants' counsel was free to make multiple false allegations with no notice or admonishment by the court..

ARGUMENT IN SUPPORT OF QUESTION VI

Plaintiffs requested permission of the district court to amend the complaint since at the time of the original filing, plaintiff's knowledge of the law was minimal. After having gained some experience, plaintiff realized that the issue regarding the handgun had not been properly pleaded. Plaintiffs' request for permission to amend the complaint was made in a document filed February 5, 1996. This request preceded the court's dismissal of the confiscation of property without due process cause of action. The state court hearings which the district court characterized as due process constituted violations of plaintiffs' rights to due process. Plaintiffs were forced to comply with criminal conviction sections of California Penal Code provisions when plaintiffs had never even been charged with any criminal conduct. Such action is a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment in that only persons whose property consisted of handguns were subjected to such treatment. The amendment to the complaint, if allowed, would have better stated the constitutional violation involved and would have precluded the dismissal that did take place. Plaintiffs

(especially in PRO PER) are entitled under FRCP Rule 15(a) to amend the complaint. The following is an extract of the Opinion of the Court in FOMAN v. DAVIS, 371 U.S. 178,182 (1962) written by Chief Justice Goldberg:

> "Rule 15 (a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed.1948), 15.08,15.10. If the underlying facts or circumstances relied upon by a plaintiff may he a proper subject of relief, he ought to he afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason---such as undue delay. bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment. futility of amendment, etc.---the leave sought should, as the rules require, be "freely given.." Of course the grant or denial of an opportunity to amend is within the discretion of the District Court. but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules. "

In the instant case , the court did not give any reason for denying plaintiffs' request to amend the complaint. Furthermore, the court did not even acknowledge that a request to amend had been made. This is contrary to F.R.C.P. Rule 15(a) as well as the Supreme Court ruling quoted above from FOMAN v. Davis.

ARGUMENT IN SUPPORT OF QUESTION VII

Does a statement in a state court by a husband appearing as PRO PER that certain property is community property,

constitute "due process" for the legal owner of that property who has never been a party to the state court hearing? The district court ruled that such mention by Edward Barsch constituted "Due Process" for Juliet Barsch, thus rendering the confiscation and destruction of the property as a legal act. The court then dismissed sua sponte plaintiffs' cause of legal action for the illegal confiscation and destruction of plaintiffs' property. The framers of the United States Constitution would not agree that the court's mischaracterization that certain property was community property constituted "DUE PROCESS" for a person not before the court at a court hearing.

ARGUMENT IN SUPPORT OF QUESTION VIII

The district court converted a pleading by defendants' counsel's submitted as a FRCP, Rule 56 Motion for Summary Judgement into a FRCP, Rule 12(b)(6) motion to amend the answer to the complaint. An answer had never been filed in this case. Amendment of a non-existent document is both legally and logically impossible. The district court thus allowed defendants to assert the statute of limitations as an amendment to an answer that had never been filed, 17 months after the complaint was filed. Such untimely allowance of the statute of limitations defense is contrary to all other court rulings regarding timeliness of pleading the statue of limitations including previous ruling by the Supreme Court. In a previous district court hearing on November 8, 1996, the district court made the statement regarding filing the answer "There is nothing to amend." However, in the court order of November 25, 1996, the court allowed defendants to assert the statute of limitations as an amendment to an answer that had never been filed. .

ARGUMENT IN SUPPORT OF QUESTION IX

On November 21, 1996, plaintiff received via deposit in the mail box, the court order of November 13, 1996. This is one of the district court orders appealed but ignored by the appeals

court. Plaintiff contends that a clear reading of the order does not call for re-service of Joseph Brann. Since Joseph Brann at the time was the head of a Washington, D.C. agency, service within 15 minutes would have been impossible even if plaintiff had received the order a day earlier. No court in good faith can impose conditions that are physically impossible to comply with.

ARGUMENT IN SUPPORT OF QUESTION X

Various pleadings and documents filed by plaintiffs have been completely ignored by the court with no notice taken. An example in the district court is the document filed by plaintiff on October 19, 1995 which included Exhibit B titled DECLARATION OF SERVICE AND STATEMENT OF SERVICE FEES.
This exhibit was a statement from the professional process serving organization hired by the plaintiff. This statement provided the details about service of Joseph Brann which had been done on July 21, 1995 in accordance with California Rules of Civil Procedure.415.40.The district court ignored the process server's statement and later accepted the false allegation by defendants' counsel that Joseph Brann had never been served. In Appellant's Reply Brief this document was cited as well as a copy of the registered return receipt was included . In both instances plaintiffs' documented proof was ignored and the court's decision was based on the false allegations by defendants' counsel. In the district court, plaintiffs' request for permission to amend the complaint was ignored. Plaintiffs' Requests for Judicial Notice were also ignored. Can justice prevail if the court accepts the pleadings of one party although those pleadings contain false allegations in the matter before the court and ignores the pleadings and papers of the other party?

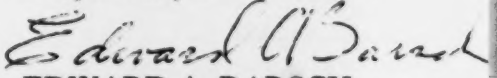
CONCLUSION

From even a perfunctory review of the record ,it is apparent that plaintiffs have not been treated fairly in the district court as

well as in the appellate court. From the frustration of court rulings that are patently unfair and the fact that defendants' counsel has been permitted to make false allegations with impunity in both the district court proceedings as well as in the appellate court, a great deal of plaintiff's pride in being an American has been diminished. Plaintiff served in World War II and is a retired member of the Regular Army of the United States. Plaintiff has seen other governments in many tours of overseas duty. The police in Hayward, California, are no better than the reviled Nazi police of World War II. The actions of the lower court seem to be more in tune with the Russian model than what should be the American ideal. Plaintiffs experiences over the past 5 years would seem to explain why many American citizens have lost faith in the government and the political/legal systems. Plaintiff Edward Barsch has always believed in the American system but has been disillusioned by the results of this case so far.

Dated: January 29, 1998

Respectfully submitted,



EDWARD A. BARSCH
1147 Buchanan Way
Hayward, Ca 94545
(510) 887-4127
PETITIONER PRO SE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JULIET D. BARSCH, Plaintiff,	)	No. 97-15064
	)	D.C. No
	)	CV-95-02486- MHP
	)	Northern California
and	)	(San Francisco)
	)	
EDWARD A. BARSCH,	)	
	)	ORDER
Plaintiff-Appellant,	)	
	)	
v,	)	
JOSEPH BRANN, Police Chief; MICHAEL O'TOOLE; DEBRA MARGOLIS; LLOYD MEYERS; P. RIBERA; LINDBLOM; TABKE; R. RUSHWORTH; J. MARTINEZ; R. McKEE; R. SANTOS; S. RICHARDSON; MYRON DORN; RONALD M. SABRAW	)	
Defendants-Appellees	)	

FILED
NOV-7 1997
CATHY A.CATTERSON
CLERK, U.S. COURT
OF APPEALS

Before: SCHROEDER, FERNANDEZ and RYMER, Circuit Judges

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JULIET D. BARSCH, Plaintiff, and EDWARD A. BARSCH Plaintiff-Appellant; v. JOSEPH BRANN, POLICE CHIEF; M. O'TOOLE; D. MARGOLIS; L. MEYERS; P. RIBERA; LINDBLOM; TABKE; R. RUSHWORTH; J. MARTINEZ; R. MCKEE; R. SANTOS; R. RICHARDSON; M. DORN; RONALD M. SABRAW. Defendants-Appellees	No. 97-15064 D.C.No.CV-95-02486-MHP MEMORANDUM*

FILED
SEP 4 1997
CATHY A. CATTERSON, CLERK U.S.COURT OF APPEALS

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Submitted August 25, 1997**

Before: SCHROEDER, FERNANDEZ, and RYMER, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as

provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Edward A. Barsch appeals pro se[1/] the district court's dismissal of his 42 U.S.C. S 1983 action alleging that various police officers from the City of Hayward violated his civil rights when in response to a 911 call from Barsch's wife, Juliet Barsch they conducted a warrantless search of Barsch's residence and arrested Barsch. Barsch also alleged that defendant Ronald M. Sabraw, a superior court judge, violated his civil rights when he ordered the destruction of a handgun, registered to Juliet Barsch, recovered one day after the incident. We have jurisdiction pursuant to 28 U.S.C. S 1291, and we affirm.

A. May 1, 1996 order

The district court did not err by dismissing defendant Joseph Brann, former Chief of Police for the City of Hayward, because he was never properly served with Barsch's summons and complaint. See Fed. R. Civ. P. 4 (m), 12 (b) (5).

With respect to Barsch's contention that his Second Amendment right to bear arms was violated, the district court did not err by dismissing this claim for lack of standing. See Hickman v. Block, 81 F.3d 98, 101 (9th Cir.), cert. denied, 11 S7 S. Ct. 276 (1996) ("[T] he Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen.").

1/ Because Barsch is proceeding pro se, he has no authority to represent the legal interest of others. See Cato v. United States, 70 F.3d 1103, 1105 n.1 (9th Cir. 1995). Furthermore, because Barsch's wife, Juliet Barsch, did not sign the complaint we conclude that she was not a party before the district court. See id.; see also Fed. R. Civ. P. 3, 11. Thus, Juliet Barsch is not a party to this appeal. See Fed. R. App. P. 3.

The district court also did not err by dismissing Barsch's due process claims alleging that he was improperly denied the return of the handgun. Barsch was provided the opportunity to appear in state court to argue against the confiscation of the handgun. See United States v. Yochum (In re Yochum), 89 F.3d 661, 672 (9th Cir. 1996).

B. December 6, 1996 order

Barsch's cause of action arose on January 26, 1993, the date the police officers entered his residence, conducted their search, and arrested Barsch. The applicable statute of limitations in California is one year. See Elliott v. City of Union City, 25 F.3d 800, 802 (9th Cir. 1994). Barsch did not file his complaint until July 11, 1995. The district court did not err by dismissing Barsch's remaining claims as time-barred.

C. Bias

We reject Barsch's contention that the district court was biased. See Liteky v. United States, 510 U.S. 540, 555 (1994).

AFFIRMED. [2/]

2/ To the extent Barsch contends that the district court should have granted him leave to amend his complaint, the district court did not err because amendment would be futile. See Franklin V. Murphy, 745 F.2d 1221, 1228 n.9 (9th Cir. 1984).

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JULIET D. BARSCH and EDWARD A. BARSCH

Plaintiffs,

v.

JOSEPH BRANN, et al.,

Defendants.

No. C-95-2486 MHP

ORDER

ORIGINAL
FILED
NOV 25 1996
RICHARD W. WIEKING
CLERK,U.S.DISTRICT
COURT, NORTHERN
DISTRICT OF CALIFORNIA

Plaintiffs filed this action under 42 U.S.C. § 1983 alleging various civil rights violations against numerous defendants in the City of Hayward. On August 8, 1995 this court dismissed Judge Ronald Sabraw as a defendant. On April 29, 1996, this court dismissed the claims against Joseph Brann, Chief of Hayward Police, on the grounds that plaintiffs failed to serve notice pursuant to court order. On April 29, 1996, this court also dismissed several of plaintiffs' claims for failure to state a claim. This order resulted in the dismissal of the following individuals as defendants: Officer Ribera, Officer Dorn, Officer Meyers, Michael O'Toole, and Debra Margolis. The remaining defendants-- Officers Lindblom, Tabke, Rushworth, Martinez, McKee, Santos, and Richardson-- now seek to dismiss the remaining causes of action on the grounds that the statute of limitations has expired. Defendants also ask this court to dismiss the claims against them on the grounds of qualified immunity; however, it is not necessary for the court to decide that issue, nor would it be appropriate at this stage of the proceedings since the issue goes to the reasonableness of the officers' conduct.

The claims that remain after the earlier dismissal order stem from an incident that occurred on January 26, 1993. On that date, the defendant police officers responded to a 911 call that originated at plaintiffs' house. Plaintiffs' first and second claims allege that defendants violated section 1983 when the police entered their home and handcuffed them and their son. The fourth claim alleges that Officer Tabke violated section 1983 by arresting plaintiff Edward Barsch.

Defendants assert that plaintiffs did not file their complaint within the appropriate statute of limitations period. The statute of limitations for a section 1983 claim is one year from the date the cause of action arose. Elliott v. City of Union City, 25 F.3d 800, 802 (9th Cir. 1994) (noting that the appropriate period is that of the forum state's statute of limitations for personal injury torts and California's Civil Procedure Code section 340 (a) provides for a one year period) Plaintiffs assert that the correct reference date is the date of limitations and requires the party so defending to affirmatively set forth such plea. See Perlmutter v. Shatzer, 102 F.R.D. 245, 247 (D. Mass. 1984). If not set forth when the complaint is initially answered, a party may amend or supplement its answer to include the statute of limitations defense under the provisions of Federal Rule of Civil Procedure 15(a). Rule 15(a) provides for such amendment either (1) within 20 days after the answer is served; (2) by written consent of the adverse party; or (3) by leave of the court. Fed. R. Civ. P. 15(a). Further, the rule states that "leave shall be freely given when justice so requires." Id. The Supreme Court has interpreted Rule 15 (a) as requiring that leave to amend be granted in the absence of any apparent or declared reason such as undue delay, bad faith, or dilatory motive on the part of the movant. Foman v. Davis, 371 U.S. 178, 182 (1962). In this case defendants have never filed their answer, thus, ordinarily they would be permitted to include in their answer any defenses they have including the statute of limitations.[2] They also may proceed by filing a motion to dismiss under Federal Rule of Civil Procedure 12(b) (6).[3] However, because of the stage of

these proceeding, pretrial and trial dates having been set, the court finds that looking to the leave to amend cases is instructive.

The Third Circuit has held that amendment of an answer in order to assert the defense of statute of limitations should ordinarily be permitted under the standard of Foman V. Davis. The fact that plaintiffs' claims may fail as a result of permitting the amendment does not constitute prejudice since the assertion of the statute of limitations would have applied at the time the suit was initiated. Wyshak v. City Nat'l Bank, 607 F.2d 824, 826-27 (9th Cir. 1979); see also Phelps V. McClellan, 30 F.3d 658, 662-63 (6th Cir. 1994) (holding that there is no prejudice where "amendment embodies a legally valid defense")

Accordingly, plaintiffs have not shown any reason why defendants should not be permitted to assert a legitimate defense which defendants are entitled to assert, namely, the statute of limitations. This court finds that defendants have not waived their statute of limitations defense. For the same reasons that the defendants would be granted leave to amend their answer, this court may grant defendants' motion to dismiss.

For the foregoing reasons, this court GRANTS defendants' motion to dismiss based on failure to file their complaint claim within the statute of limitations.

Dated: November 25, 1996 "s /M. Hall Patel"

MARILYN HALL PATEL
United States District Judge

ENDNOTE S

1. For a more detailed recitation of the facts, see Barsch v. Brann, 1996 WL 231023, *1 (N.D. Cal. Apr. 29, 1996).

2. Defendants' counsel claims an answer was filed; however, the court has no record of an answer being filed. It does not appear in the court file or on the docket sheet. She was asked to submit an endorsed "filed" copy to clear the matter up, but has failed to do so.

3. Defendants title their motion "Motion to dismiss for failure to state a cause of action under Rule 56." Rule 56 of the Federal Rules of Civil Procedure relates to motions for summary judgment. The motion before this court is not a summary judgment motion--indeed an answer has not even been filed-- but a Rule 12(b) (6) motion to dismiss. This confusion and the quality of defendants' papers suggest that a great deal of time needs to be spent with the Federal Rules of Civil Procedure and applicable federal case law.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JULIET BARSCH, ET AL.,) No. C-95-02486 MHP
) MEMORANDUM AND
Plaintiffs,) ORDER
)
vs.)
JOSEPH BRANN, ET AL.,)
)
Defendants,)
)

FILED
JUN 11 7:56 AM '96
RICHARD W. WIEKING
CLERK, U.S. DISTRICT
COURT, NORTHERN
DISTRICT OF CALIFORNIA

In response to the court's order of April 29, 1996, dismissing various claims brought by Juliet and Edward Barsch, plaintiffs request leave to file a motion for reconsideration based on local rules 7-9(b)(2) & (3). plaintiffs appear to argue that the court manifestly failed to consider material facts, namely that plaintiffs were not responsible for their failure to comply with a scheduling order and that the dismissal of their Fifth Amendment claims was improper.

However, regardless of who was responsible for the repeated delays in properly serving defendants, plaintiffs were not prejudiced by them. Furthermore, the court's decision with respect to the Fifth Amendment claims was based on all material facts presented to it. Finally, the court finds no basis for plaintiffs' contention that new material facts or changes in the law merit reconsideration.

Accordingly, plaintiffs' request to move for reconsideration of the court's order of April 29, 1996, is hereby DENIED.

IT IS SO ORDERED.

DATED: JUN 11 1996

"s/Marilyn Hall Patel"
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JULIET BARSCH, ET AL.,	)	No. C-95-02486 MHP
	)	MEMORANDUM AND
Plaintiffs,	)	ORDER
	)	
vs.	)	
JOSEPH BRANN, ET AL.,	)	
	)	
Defendants,	)	
	)	

FILED
Apr 29 1996
RICHARD W. WIEKING
CLERK, U.S. DISTRICT
COURT, NORTHERN
DISTRICT OF CALIFORNIA

Plaintiffs Juliet and Edward Barsch bring this action against eleven City of Hayward police officers, two City of Hayward attorneys and one Alameda County Superior Court alleging fourteen causes of actions predicated on 42 U.S.C.A. section 1983.[1]

Now before this court is defendants' motion to dismiss on the grounds that plaintiffs have failed to state facts sufficient to constitute a claim under federal law.[2] Also before this court is defendant Brann's motion to dismiss for defects in service of process.

Having considered the parties' arguments and submissions, and for the reasons set forth below, the court enters the following memorandum and order.

BACKGROUND[3]

On January 26, 1993 certain defendant Hayward police officers responded to a 911 call that originated in plaintiffs' house. The 911 operator told police that the call was an "open-line" call during which a woman was heard crying and two men were heard discussing a gun.[4] The police arrived at plaintiffs' home and instructed plaintiffs to come outside. When plaintiffs, along with their then fourteen year-old son, Sean, complied, Mr. Barsch was handcuffed and arrested at gunpoint. Mr. Barsch, who suffers from diabetes and therefore has limited circulation to his hands, repeatedly asked the officers to loosen the handcuffs. These requests were ignored. Defendants also handcuffed and took Mrs. and Sean Barsch into custody at gunpoint.

While plaintiffs and their son were held in patrol cars, defendant police officers entered and searched plaintiffs' residence without a warrant. Pursuant to this search the police retrieved a .30 caliber rifle, assorted bullets and loaded magazines, a pair of wooden nunchakus and a gun case for a P85 Ruger. Plaintiffs and their son were then brought to the Hayward police station and Mr. Barsch was released approximately fourteen hours later without being charged. The items that were seized during defendants' search were returned to plaintiffs on February 18, 1993.

Subsequent to his arrest, Mr. Barsch filed numerous complaints with the City of Hayward. In these he asserted: that he had been treated unlawfully by defendant police officers at the time of his arrest; that the police officers had filed a false report of domestic violence; that the police had unlawfully searched his house; and that the police officers had failed to issue him a receipt for the seized weapons and ammunition and had returned them in an untimely manner. On June 29, 1993 defendant Dorn, a Hayward police captain, notified Mr. Barsch that his complaints were unfounded. On July 30, 1993 the then Hayward City Attorney, Alice C. Graff, issued a rejection of claim letter to Mr. Barsch because his claims did not provide a legal basis for

payment.

In a related incident, on the day after Mr. Barsch's arrest, the Hayward police recovered plaintiffs' semi-automatic Ruger handgun after it was loaned by Sean Barsch to an unknown juvenile who used the weapon to threaten another juvenile. It was a conversation between Mr. Barsch and Sean about this missing handgun that the 911 operator allegedly overheard.

Mr. Barsch filed claims with the City of Hayward to obtain the return of the Ruger handgun, which was registered in his wife's name. Mr. Barsch thereafter appeared twice before Judge Sabraw in the Alameda Superior Court in an attempt to have the handgun returned. The court denied Mr. Barsch's request and ordered the gun destroyed after Mr. Barsch stated that he had no control over the use his son might make of the gun and that if the police tried to enter his house again without a warrant he would "drop the first one that came in right between the eyes." Mrs. Barsch thereafter filed a complaint with the Hayward city Manager asserting that she had not been given the opportunity to recover her gun and threatening litigation unless the gun was returned promptly. After this claim was rejected, plaintiffs initiated this lawsuit.

LEGAL STANDARD

A motion to dismiss will be denied unless it appears that the plaintiff can prove no set of facts which would entitle him or her to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco, 792 F.2d 1432, 1435 (9th Cir. 1986), cert. denied, 479 U.S. 1064 (1987). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion.

Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir.), cert. denied sub. nom. Wyoming Community Dev. Auth. v. Durning, 484 U.S. 944 (1987).

DISCUSSION

I. Rule 12(b)(6) Motion[5]

Defendants argue that plaintiffs' entire complaint should be dismissed because it does not state facts sufficient to constitute a violation of federal law. Additionally, defendants assert that plaintiffs' claims should be dismissed because all conduct of which plaintiffs complain entailed discretionary acts by city officials for which no liability can attach.

42 U.S.C. section 1983 "provides a cause of action for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States." Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990). It is well settled that section 1983 "provides a cause of action for violations of federal statutes as well as the Constitution." Id.; Buckley v. City of Redding, 66 F.3d 188, 190 (9th Cir. 1995). Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. Graham v. Connor, 490 U.S. 386, 393-94 (1989). To state a claim under section 1983, a plaintiff must allege two essential elements, one, the violation of a right secured by the Constitution or laws of the United States, and two, that the alleged deprivation was committed by a person acting under color of state law. West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda County, 811 F.2d 1243, 1245 (9th Cir. 1987).Section 1983 does not impose liability for violations of duties of care arising out of state tort law. Deshaney v. Winnebago County Social Servs. Dep't, 489 U.S. 189, 201-03 (1989); Baker v. McCollan, 443 U.S. 137, 146 (1979) (without more no action for false imprisonment). To

state a claim a plaintiff must show a specific constitutional or federal guarantee safeguarding the interests that have been invaded. Paul V. Davis, 424 U.S. 693, 697, reh'g denied, 425 U.S. 985 (1976).

Accordingly, the court must assess whether plaintiffs' complaint states any claims cognizable under this standard.[6]

A. Fourth Amendment Claims

Plaintiffs' first, second and fourth claims allege that the conduct of the seven officers who descended upon their home violated a variety of their constitutionally protected rights, the right to be free from home invasion; the right to be free from unreasonable searches and seizures; the right to be free from unjustified life threatening police raids; the right to be free from false arrest and false imprisonment; the right to be free from warrantless arrest; and the right to be free from arrest without probable cause.

Construed liberally, plaintiffs' first, second and fourth claims allege various Fourth Amendment violations: false arrest and imprisonment; arrest with use of excessive force; and illegal search of their home and illegal seizure of personal property pursuant to that search.[7]

1. False Arrest and Imprisonment

A claim of illegal arrest is cognizable under section 1983 for violation of the Fourth Amendment's prohibition against unreasonable search and seizure if the allegation is that the arrest was without probable cause or other justification. Pierson v. Ray, 386 U.S. 547, 555-558 (1967); Larson v. Neimi, 9 , F.3d 1397, 1400 (9th Cir. 1993); Forster v. County of Santa Barbara, 896 F.2d 1146, 1147 (9th Cir. 1990). Probable cause exists when, at the time of arrest, the officers know reasonable trustworthy information sufficient to warrant a prudent person in believing that an individual has committed or was committing an offense. Allen v. City of Portland, 73 F.3d 232, 235 (9th Cir. 1995). A claim of

bad faith in making an arrest may also be a cause of action under section 1983 as an illegal and unconstitutional arrest. Bretz v. Kelman, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc)

There is, however, no substantive right under the due process clause of the Fourteenth Amendment to be free from criminal arrest or prosecution except upon probable cause. To whatever extent relief may be available it is only under the Fourth Amendment. See Albright v. Oliver, 114 5. Ct. 807, 81015, reh'g denied, 114 S. Ct. 1340 (1994); see also Sanders V. Kennedy, 794 F.2d 478 (9th Cir. 1986) (Fourth Amendment claims not barred by Parratt v. Taylor). Any illegal or wrongful arrest claim should therefore be reviewed under the Fourth Amendment's "reasonableness" standard, rather than under a "substantive due process" approach. Larson, 9 F.3d at 1400. No specific intent is required. Caballero V. City of Concord, 956 F.2d 204, 206 (9th Cir. 1992) (no specific intent required to establish section 1983 claim for false arrest under Fourth Amendment).

A claim for wrongful detention (false imprisonment) absent a cognizable claim for wrongful arrest will not ordinarily state an independent claim under section 1983. See Baker v. McCollan, 443 U.S. 137, 142-145 (1979) (question is whether detention unconstitutional and person arrested pursuant to warrant issued on showing of probable cause not constitutionally entitled to separate judicial determination of probable cause to detain pending trial; absent lack of validity of warrant, claim is for violation of state tort law, at best). Where an initial arrest is invalid, however, a claim for unlawful detention may be cognizable. See Smiddy v. Varney, 665 F.2d 261, 264-65 (9th Cir. 1981), cert. denied, 459 U.S. 829 (1982).

Mr. Barsch alleges that the police lacked probable cause to arrest him. It is undisputed that Mr. Barsch was arrested without a warrant. He alleges that the 911 operator did not overhear an incident of domestic violence, but rather a discussion between Mr. Barsch and his son. Mr. Barsch also alleges that the police lacked probable cause because defendant Tabke was unable

to observe any visible physical injury on Mrs. Barsch's face.[8] Absent physical injury, Mr. Barsch asserts that the police could not have had probable cause to arrest under California Penal Code Section 273.5.[9] Finally, plaintiffs argue that because Mrs. Barsch's statement that Mr. Barsch struck her face is untrue and was dictated to her by the police after her husband's arrest and while she was in a state of emotional shock, this statement could not have been a basis for probable cause.

Given the fact sensitive inquiry necessary to reach a determination of whether probable cause existed, it would be inappropriate to dismiss Mr. Barsch's false arrest claim on a motion to dismiss.

2. Arrest with Use of Excessive Force

The use of excessive force by a law enforcement officer in effectuating an arrest states a valid claim under 42 U.S.C. section 1983. Rutherford v. City of Berkeley, 780 F.2d 1444, 1447 (9th Cir. 1986). Excessive force claims which arise in the context of an arrest or investigatory stop of a free citizen are analyzed under the Fourth Amendment reasonableness standard. Graham v. Connor, 490 U.S. 386, 394-95 (1989); Forrester v. City of San Diego, 25 F.3d 804, 806 (9th Cir. 1994), cert. denied, 115 5. Ct. 1104 (1995). This analysis applies to any arrest situation where force is used, whether it involves physical restraint, use of a baton, use of a gun, or use of a dog. Mendoza v. Block, 27 F. 3d 1357, 1362-63 (9th Cir. 1994) (deputies' use of police dog to find suspect and secure him until handcuffed analyzed under reasonableness standard).

Determining whether the force used to effect a particular seizure is reasonable requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. Graham, 490 U.S. at 396. Because the reasonableness test is not capable of precise definition or mechanical application, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect

poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. Id.; see also Tennessee v. Garner, 471 U.S. 1,3 (1985) (use of deadly force reasonable only if officer has probable cause to believe that suspect poses significant threat of death or serious physical injury to officer or others). These factors are not exclusive, however, and the totality of the particular circumstances of each case must be considered. Fikes v. Cleghorn, 47 F.3d 1011, 1014 (9th Cir. 1995) (jury instruction complies with Graham by focusing or totality of circumstances): Forrester, 25 F.3d at 806 n.2.

The reasonableness inquiry in excessive force cases is an objective one, the question being whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation, Graham, 490 U.S. at 397, and without the "20/20 vision of hindsight," id. at 396. Police officers are not required to use the least intrusive degree of force possible; they are required only to act within a reasonable range of conduct. See Forrester, 25 F.3d at 806-07 (use of minimal and controlled force in manner designed to limit injuries reasonable); see also Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994) (requiring officers to find and choose least intrusive alternative would require them to exercise superhuman judgment), cert. denied, 115 S. Ct. 2612 (1995). A plaintiff may prove excessive force, however, even where there is no significant injury. Wilks v. Reyes, 5 F.3d 412, 416 n.l (9th Cir. 1993) (plaintiff entitled to award of nominal damages even if no actual damage suffered).

Mr. Barsch alleges that the police arrested him with excessive force because the police did not need to hold him and his family at gunpoint. Mr. Barsch also challenges the use of handcuffs and the police's refusal to loosen them when he informed them of his diabetes. Finally, Mr. Barsch challenges the discomfort he suffered as a result of being lightly clothed on the hard plastic seat of a patrol car in cold weather.

Because determining the issue of whether the force

used to effect a particular seizure is reasonable requires careful attention to the facts and circumstances of each case, it would be inappropriate to dismiss this claim at this stage in the litigation.

3. Illegal Search

The Fourth Amendment proscribes "unreasonable searches and seizures." U.S. Const. amend. IV; Allen, 73 F.3d at 235; Franklin V. Foxworth, 31 F.3d 873, 875 (9th Cir. 1994). Warrants are generally required to search a person's home or his person unless the exigencies of the situation makes the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment. Mincey v. Arizona, 437 U.S. 385, 393-94 (1978); Murdock v. Stout, 54 F.3d 1437, 1440-41 (9th Cir. 1995).

The "reasonableness" of a search or seizure is determined by the existence of probable cause. See Allen, 73 F.3d at 235 (warrantless arrest); United States v. Dunn, 935 F.2d 1053, 1057 (9th Cir.) (warrantless search of automobile), cert. denied, 502 U.S. 950 (1991). Probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime;" it does not demand any showing that such a belief be correct or more likely true than false. Id. (quoting Texas v. Brown, 460 U.S. 730, 742 (1983)) (internal citation and quotation marks omitted).

The reasonableness of a search or seizure also depends "on how it is carried out." Garner, 471 U.S. at 7-8. In other words, even when supported by probable cause, a search or seizure may be invalid if carried out in an unreasonable fashion. Franklin, 31 F.3d at 875; see also United States v. Becker, 929 F.2d 442, 446 (9th Cir.) (reasonableness in scope can be vitiated by manner in which police conduct search), cert. denied, 502 U.S. 862 (1991). The reasonableness test established in Graham, 490 U.S. at 387, for cases involving police use of excessive force in making stops or arrests, applies to the manner in which the police conduct any search or seizure, including limited detentions, and to

forms of police conduct other than the use of force. Franklin, 31 F.3d at 876.

Defendants do not contest plaintiffs' allegation that they conducted a warrantless search. The issue therefore becomes whether the exigencies of the situation made defendants' warrantless search of plaintiffs' house objectively reasonable. See Mincey, 437 U.S. at 393-94. Where, as here, evidence of actions taken in furtherance of a search or seizure raises a question as to the objective reasonableness of the officers' conduct, the question is one for the jury. See Freeman v. City of Santa Ana, 68 F.3d 1180, 1186-87 (9th Cir. 1995) (where evidence open to conflicting interpretations, error for district court to conclude searches and seizures objectively reasonable as matter of law). Accordingly, it would be inappropriate for the court to dismiss plaintiffs' illegal search claim on a motion to dismiss.

B. Second Amendment Claim

Defendants' eighth claim alleges that defendants' confiscation and~destruction of the Ruger handgun, pursuant to California Penal Code section 12028, violated their Second Amendment right to bear arms.

The Supreme Court has long held that the Second Amendment is not an absolute bar to regulation of the use or possession of firearms; it only guarantees use or possession which "has some reasonable relationship to the preservation or efficiency of a well-regulated militia." See United States v. Miller, 307 U.S. 174, 178 (1939). Just this month this Circuit ruled that an individual does not have standing to make a claim under the Second Amendment because the right guaranteed under that Amendment runs to the states, not to individuals. Hickman v. Block, No. 94-55836, slip op. 4163, 4170-73, 1996 WL 157204 (9th Cir. April 5, 1996) (noting that "no individual has ever succeeded in demonstrating such injury [injury to a legally protected interest under the Second Amendment] in federal court". id. at 4170).

The court therefore rejects plaintiffs' allegation that

defendants' acts give rise to a section 1983 claim by violating the Second Amendment. Accordingly, this claim is dismissed.

C. Fifth Amendment Claims

Plaintiffs' tenth, eleventh and fourteenth claims allege violations of their Fifth Amendment right to due process. Because defendants allegedly confiscated the Ruger handgun without providing plaintiffs an adequate opportunity to seek its return and because the court that ordered its confiscation allegedly misapplied California law, plaintiffs seek relief.

Mr. Barsch appeared twice before the Alameda County Superior Court in an attempt to prevent the confiscation of the handgun registered in Mrs. Barsch's name.[11] Defendants do not dispute that the handgun is a protected property interest. However, the court is unwilling to find that two hearings before a judge of the California Superior Court is less process than is due to plaintiffs. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (the root of the due process clause is that an individual be given an opportunity for a hearing before he or she is deprived of a protected interest). Furthermore, plaintiffs could have sought review of the Judge's order through the state appellate processes which were available to him.

Accordingly, these claims are dismissed.

D. Slander and Libel Claims

Plaintiffs' third and twelfth claims allege violations of their right to be free from false libelous accusations, their right to have police reports be complete and truthful, their right to be free from slander, libel and defamation of character and their right to be free from character assassination. Plaintiffs allege that these rights are all protected by the United States Constitution.

The gravamen of these claims is that the police and the city attorney's office have harmed plaintiffs' reputation by publishing false statements about the incident of domestic violence and about Mr. Barsch's threats against police. Because these are essentially defamation causes of action and are not based on constitutional deprivations, these claims are not cognizable under

42 U.S.C. section 1983. See Siegert v. Gilley, 500 U.S. 226, 233 (1991); Paul v. Davis, 424 U.S. 693, 710-12, reh'g denied, 425 U.S. 985 (1976).

Accordingly, these claims are dismissed.

E. Remainder of Plaintiffs' Claims

The remainder of plaintiffs' claims, i.e. their fifth, sixth, seventh, ninth and thirteenth claims, are not cognizable under section 1983 because they fail to allege a specific constitutional or federal guarantee safeguarding the interests that have allegedly been invaded. See Paul, 424 U.S. at 697. To the extent that any are based on violations of duties of care arising out of state tort law, they also are not cognizable under section 1983. DeShaney, 489 U.S. at 201-03.

Accordingly, these claims are dismissed.

II. Motion to Dismiss Pursuant to Rule 12(b)(5) and 4(m)

Although the court need not reach the issue of service of defendant Joseph Brann in view of the above rulings, for sake of completeness the court will dispose of it. Mr. Brann was the Chief of the Hayward Police Department. He seeks dismissal of plaintiffs' claims pursuant to Rules 12(b)(5) and 4(m) for failure to timely serve the summons and complaint in this action. Brann argues that plaintiffs have not complied with the order issued by this court on November 13, 1995.[12]

Plaintiffs failed to comply with the court's order because they did not mail a copy of the summons and complaint until November 22, 1995. Furthermore, although the court's order clearly states that the Hayward City Attorney would not accept service on behalf of Brann, plaintiffs mailed the summons and complaint to the Hayward City Attorney's office.

The court therefore lacks personal jurisdiction over defendant Brann and he is dismissed from this action. Because plaintiffs did not comply with the court's order this dismissal is with prejudice.

CONCLUSION

For the foregoing reasons, the court hereby:

(a) GRANTS defendants O'Toole, Margolis, Meyers, Ribera, Lindblom, Tabke, Rushworth, Martinez, McKee, Santos, Richardson and Dorn's motion to dismiss all claims

EXCEPT:

(1) plaintiffs' false arrest claim;

(2) plaintiffs' arrest with use of excessive force claim

(3) plaintiffs' illegal search claim; and

(b) GRANTS defendant Brann's motion to dismiss with prejudice.

IT IS SO ORDERED.

DATED: April 29,1996

" s/ Marilyn Hall Patel"
United States District
Judge

ENDNOTES

1. On August 10, 1995 the court issued an order dismissing Judge Sabraw from this action.

2. All remaining defendants, except Joseph Brann, join in this motion to dismiss for failure to state a claim.

3. Unless otherwise indicated, the following facts, accepted as true for the purposes of this motion, are taken from plaintiffs' complaint.

4. In the body of their complaint, plaintiffs do not allege that the police responded to a 911 call from Juliet Barsch. Instead, plaintiffs' factual allegations begin with the arrival of the police at their home. However, attached to plaintiffs' complaint is a statement by Juliet Barsch, made shortly after the police arrived at her home, in which she claims that she phoned 911 because her husband struck her in the face. She also stated that although she did not speak with anyone at 911, she and her husband discussed a missing gun at the time. The court may appropriately consider documents attached to a complaint in evaluating the merits of a Rule 12(b) (6) motion because such documents are deemed part of the complaint. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir.), cert. denied sub. nom. Wyoming Community Dev. Auth. v. Durning, 484 U.S. 944 (1987).

In their complaint, plaintiffs allege that Juliet Barsch's statement was dictated to her by the police when she was in a state of emotional shock and is untrue. Plaintiffs further allege that the incident report of domestic violence is an ex post facto fabrication by defendants to justify the allegedly unlaw arrest of Edward Barsch. Plaintiffs also argue in their papers on this motion that Juliet Barsch meant to dial 411 but erroneously dialed 911.

5. This motion is brought by the following defendants: Hayward City Attorney Michael O'Toole; Hayward Assistant City Attorney Debra Margolis; Officer Lloyd Meyers; Officer Philip Ribera; Officer Reid Lindblom; Officer Gary Tabke; Officer Renee Rushworth; Officer Jason Martinez; Officer Ron McKee; Officer Rhein Santos; Officer B. Richardson; and, Officer Myron Dorn. The only remaining defendant who does not join this motion is Police Chief Joseph Brann, whose motion to dismiss for improper service is discussed later in this memorandum and order.

6. Plaintiffs allege that all conduct challenged in their complaint occurred while all defendants were acting under color of state law in their official duties as Hayward city officials. Defendants do not contest this allegation. Accordingly, the following discussion need only address whether plaintiffs have adequately alleged the violation of a right secured by the Constitution or laws of the United States.

7. Plaintiffs' first and second claims are against defendants Tabke, Lindblom, Martinez, Rushworth, McKee, Santos and Richardson. Plaintiffs' fourth claim is against defendant McKee, the officer who completed the domestic violence incident report.

8. In the incident report filed by defendant Tabke, he stated "I observed Juliet's face and noted no visible injury. Juliet said her face was sore but did not require any medical attention."

9. This statute provides: "Any person who willfully inflicts upon his or her spouse . . . corporal injury resulting in a traumatic condition, is guilty of a felony." Cal. Penal Code § 273.5 (West Supp. 1996).

10. Plaintiffs allege that this treatment was "in essence cruel: and unusual punishment." In their papers on this motion, however, plaintiffs rescind this eighth amendment allegation. □

11. The latter appearance was at a motion for rehearing granted by the court following its December 30, 1993 order denying the return of the weapon. At this latter hearing Mr. Barsch first testified under oath that the gun belonged to him. When defendant Margolis informed the court otherwise, Mr. Barsch stated that the gun was registered in his wife's name but that he was representing her interest since it was community property. Plaintiffs attached a copy of the transcript of this hearing to their complaint.

12. The court granted Brann and other defendants' motion to dismiss pursuant to Rule 12(b)(5) and ordered plaintiffs either to hand deliver or mail by 5:00 p.m. on November 21, 1995 a copy of the summons and complaint to the Hayward's City Attorney's office and to include two notices and acknowledgements of receipt for each defendant. In its order, however, the court clearly stated that the City Attorney was not accepting service on behalf of Brann. □

MICHAEL. O'TOOLE (SBN 97779)
City Attorney
JAYNELLE K. BELL LOWERY (SBN 154264)
Deputy City Attorney
City of Hayward
25151 Clawiter Road
Hayward, CA 94545-2731
Telephone: (510) 293-5530

FILED
NOV 13 1995
RICHARD W. WIEKING
CLERK, U.S. DISTRICT
COURT, NORTHERN
DISTRICT OF CALIFORNIA

Attorneys for Defendants
JOSEPH BRANN, MICHAEL O'TOOLE, □
DEBRA MARGOLIS , CITY OF HAYWARD
OFFICERS LLOYD MEYERS, PHILIP RIBERA.
REID LINDBLOM, GARY TABKE,
RENEE RUSHWORTH, JASON MARTINEZ,
RON MCKE, RHEIN SANTOS, B. RICHARDSON,
AND MYRON DORN.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JULIET BARSCH and EDWARD BARSCH,

Plaintiff

v.

JOSEPH BRANN individually acting under color of law as Chief of the Hayward Police Department City of Hayward, California; MICHAEL O'TOOLE, individually acting under color of law as City Attorney for the City of

Case No. C-95-02486 MHP

ORDER GRANTING DEFENDANTS BRANN, O'TOOLE, MARGOLIS. MEYERS, RIBERA, LINDBLOM, TABKE, RUSHWORTH, MARTINEZ, MCKEE, SANTOS, RICHARDSON, AND DORN'S MOTION TO DISMISS FOR DEFECTS IN SERVICE OF PROCESS OF PLAINTIFFS' COMPLAINT [Rule 12(b)(5) F.R.C.P.]

Hayward, Ca; DEBRA MARGOLIS, individually acting under color of law as Assistant City Attorney for the City of Hayward, Ca; Officer LLOYD MEYERS, individually acting under color of law as Police Officer for the City of Hayward, Ca; Officer P. Ribera Badge No. 056 individually acting under color of law as Police Officer for the City of Hayward, Ca; Officer . Lindblom Badge No. 123 individually acting under color of law as Police Officer for the City of Hayward, Ca; Officer . Tabke Badge No. 417 individually acting under color of law as Police Officer for the City of Hayward, Ca; Officer . R. Rushworth Badge No. 405 individually acting under color of law as Police Officer for the City of Hayward, Ca; Officer J. Martinez individually acting under color of law as Police Officer for the City of Hayward, Ca; Officer . R. McKee Badge No. 324 individually acting under color of law as Police Officer for the City of Hayward, Ca; Officer . R. Santos Badge No. 387 individually acting under color of law as a Police Officer for

the City of Hayward, Ca; Officer . B. Richardson Badge No. 332 individually acting under color of law as Police Officer for the City of Hayward, Ca; Patrol Division Commander, Captain MYRON DORN individually acting under color of law as Police Officer for the City of Hayward, Ca; JUDGE RONALD SABRAW, individually acting under color of law as a Judge in Department 30 SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA.,

---

The matter having come before Honorable Marilyn Hall Patel on October 27, 1995 at 10:30 a.m. in Courtroom 11 in the above-referenced Court located at 450 Golden Gate Avenue, San Francisco, California. The court did not require an appearance by parties.

GOOD CAUSE APPEARING:

1 Defendants Joseph Brann, Michael O'Toole, Debra Margolis, Lloyd Meyers, Philip Ribera, Reid Lindblom, Gary Tabke, Renee Rushworth, Jason Martinez, Ron McKee, Rhein Santos, B. Richardson and Myron Dorn's Motion to Dismiss the action pursuant to F.R.C.P. 1.(b)(5) because plaintiffs' complaint was not sufficiently served upon the within defendants is granted.

2. Plaintiff is to re-serve Defendants O'TOOLE,, Margolis, Meyers, Ribera, Lindblom, Tabke, Rushworth, Martinez, McKee, Santos, Richardson, Dorn and the City of

Hayward. Defendant City of Hayward agrees to accept service on behalf of the City arid the police officers, with the exception of Defendant Brann. Plaintiff is to hand deliver or mail by 5:00 p.m. on November 21,1995, a copy of the Summons and Complaint on the City of Hayward's City Attorney's office and include Two (2) Notices and Acknowledgments of receipt for each defendant herein.

3. Defendant shall have until December 15,1995 to answer or file a 12(b)(6) motion in response to Plaintiffs' Summons and Complaint. The briefing schedule provided for motions is Civil Local Rule No. 7-1. It should be followed.

DATED: Nov 13, 1995

"s/ M H Patel"
MARILYN HALL PATEL
Judge of the Northern
District of California

* A status conference will be set at the time of hearing on the motion. The date set for status conference is vacated.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF

ALAMEDA

Date:February 22, 1994 Hon. RONALD M. SABRAW, Judge
Judy E. PHELPS Deputy Clerk

Russ Knox , Court Attendant Not Reported , Reporter

EDWARD A BARSCH

Plaintiff

vs.

CITY OF HAYWARD Defendant

Counsel appearing for Plaintiff
no appearance

Counsel appearing for Defendant
no appearance

NATURE OF PROCEEDINGS: PLAINTIFF'S MOTION FOR REARING RE RETURN OF WEAPON ACTION

MISC

The above entitled action is placed on calendar by order of the Court.
The matter having been taken under submission on February 18, 1994, comes now the Court and renders the following ruling:

The Motion of Edward A. Barsch for Rehearing is granted. However, having reheard and reconsidered the matter on the merits, the previous order of this Court shall remain unchanged.

The Court finds that Mr. Barsch has failed to establish that his mm Roger handgun was stolen or used in such a manner as to constitute a nuisance pursuant to subdivision (a) or (b) of section 12028 of the Penal Code

without his prior knowledge.

The Court further finds that Mr. Barsch failed to prove he is the lawful owner of said handgun.

The effect of this order is stayed until March 22, 1994 to allow Mr. Barsch the opportunity to seek appellate review of this order.

The following are so notified by a copy of this minute order via U.S. Mail:

Edward A. Barsch
1157 Buchanan Way
Hayward, CA 94545

Debra S. Margolis, Esq.
Assistant City Attorney
25151 Clawiter Road
Hayward, CA 94545-2731

By "s/JUDY E. PHELPS"
Judy E. Phelps, Deputy Clerk

DAVID A. WEINGARD Acting City Attorney
State Bar No. 84118
DEBRA S. MARGOLIS,
Assistant City Attorney
State Bar No. 111143
25151 Clawiter Road
Hayward, California 94545-2731
Telephone: (510) 293-5530

Attorneys for HAYWARD POLICE DEPARTMENT

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

IN RE

EDWARD A. BARSCH,

No.. Misc.

ORDER AFTER HEARING

Date: December 21, 1993
Time: 9:30 a.m.
Dept: 30

This matter was heard on December 21, 1993, in Department 30 of the above-entitled court, Judge Ronald M. Sabraw presiding. Hayward Police Department appeared by its counsel, Debra S. Margolis, Assistant city Attorney, City of Hayward. Mark Thompson, Deputy District Attorney, appeared on behalf of the District Attorney's office. Edward A. Barsch appeared in propria persona. Sergeant Lloyd Myers of the Hayward Police Department was also present. The court having read and considered the oral and written evidence presented, and good cause appearing there for,

IT IS HEREBY ORDERED that Edward A. Barsch's request to have his Ruger 9mm handgun (Serial No. 302-45592) declared to be a stolen weapon is denied on the grounds that Mr. Barsch has failed to meet his burden of proof of establishing that the weapon was taken with the intent to permanently deprive Mr. Barsch of possession of the weapon. Therefore, the Hayward Police Department is authorized to destroy the weapon pursuant to the provisions of Penal Code section 12028.

IT IS FURTHER ORDERED that the effect of this order shall be stayed until January 21, 1994, to allow Mr. Barsch the opportunity to seek appellate review of this order.

DATED: DEC 30, 1993

RONALD M. SABRAW
Judge of the Superior court

AMENDMENTS TO THE UNITED STATES CONSTITUTION

AMENDMENT IV

The right of the people to be secure in their persons, houses papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8. General Rules of Pleading.

(a) CLAIMS FOR Relief. A pleading which sets forth a claim for relief whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain

statement of the grounds upon which the court' jurisdiction depends, unless the court already has jurisdiction and the clam needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may he demanded.

(b) Defenses; FORM OF Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect OF Failure To Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

RULE 11

Rule 11. Signing of Pleadings, motions, and Other Papers; Representations to court; Sanctions.

(a) SIGNATURE. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the patty is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall he stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

RULE 15

Rule 15. Amended and Supplemental Pleadings.

(a) AMENDMENTS.. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days alter it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall he freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 415.40. Service outside state; Completion of service
A summons may be served on a person outside this state in any manner provided by this article or by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt. Service of a summons by this form of mail is deemed complete on the loth day after such mailing.

CALIFORNIA PENAL CODE SECTION 12028

12028. Nuisances; Disposition of weapons

(a) The unlawful concealed carrying upon the person or within the vehicle of the carrier of any explosive substance, other than fixed ammunition, dirk, or dagger, as provided in Section 12020, the unlawful concealed carrying upon the person or within the vehicle of the carrier of any weapons in violation of Section 12025, and the unlawful possession or carrying of any item in violation of Section 653k is a nuisance.

(B) A firearm of any nature owned or possessed in violation of Section 12021, 12021.1, or 12101 or used in the commission of any misdemeanor as provided in this code, any felony, or an attempt to commit any misdemeanor as provided in this code or any felony, is, upon a conviction of the defendant or upon a juvenile court finding that an offense which would be a misdemeanor or felony if committed by an adult was committed or attempted by the juvenile with the use of a firearm, a nuisance. A finding that the defendant was guilty of the offense but was insane at the time the offense was committed is a conviction for the purposes of this section.

(c) Any weapon described in subdivision (a), or, upon conviction of the defendant or upon a juvenile court finding that an offense which would be a misdemeanor or felony if committed by an adult was committed or attempted by the juvenile with the use of a firearm, any weapon described in subdivision (b) shall be surrendered to the sheriff of a county or the chief of police or other head of a municipal police department of any city or city and county or the Commissioner of the California Highway Patrol. For purposes of this subdivision, the Commissioner of the California Highway Patrol shall receive only weapons that were confiscated by a member of the California Highway Patrol. The officers to whom the weapons are surrendered, except upon the certificate of a judge of a court of record, or of the district attorney of the county, that the retention thereof is necessary or proper to the ends of justice, may annually, between the 1st and l0th days of July, in each year, offer the weapons, which the officers in charge of them consider to have value with respect to sporting, recreational, or collection purposes, for sale at public auction to persons licensed pursuant to Section 12071 to engage in businesses involving any weapon purchased. If any weapon has been stolen and is thereafter recovered from the thief or his or her transferee, or is used in such a manner as to constitute a nuisance pursuant to subdivision (a) or (b) without the prior

knowledge of its lawful owner that it would be so used, it shall not be so offered for sale but shall be restored to the lawful owner, as soon as its use as evidence has been served, upon his or her identification of the weapon and proof of ownership.
(d) If, under this section, a weapon is not of the type that can be sold to the public, generally, or is not sold pursuant to subdivision (c), the weapon, in the month of July, next succeeding, or sooner, if necessary to conserve local resources including space and utilization of personnel who maintain files and security of those weapons, shall be destroyed so that it can no longer be used as such a weapon except upon the certificate of a judge of a court of record, or of the district attorney of the county, that the retention of it is necessary or proper to the ends of justice.
(e) This section does not apply to any firearm in the possession of the Department of Fish and Game or which was used in the violation of any provision of the Fish and Game Code or any regulation adopted pursuant thereto, or which is forfeited pursuant to Section 5008.6 of the Public Resources Code.
(f) No stolen weapon shall be sold or destroyed pursuant to subdivision (c) or (d) unless reasonable notice is given to its lawful owner, if his or her identity and address can be reasonably ascertained.